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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1793

MAXINE ALLEN and WILLIAM S. ALLEN,
Appellants,

vs.

ST. LUKE'S HOSPITAL OF KANSAS CITY,
Respondent.

APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

RESPONDENT'S MOTION TO DISMISS THE APPEAL FROM THE SUPREME COURT OF MISSOURI, BRIEF IN SUPPORT, AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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INDEX

Citations I
Opinions Below 1
Question Presented on Appeal 1
Statement of the Case 2
Motion to Dismiss the Appeal From the Supreme Court of Missouri 2
Brief in Support of Motion to Dismiss the Appeal From the Supreme Court of Missouri 4
Alternately the Petition for a Writ of Certiorari Should Be Denied 9
Conclusion 10

Citations

CASES

Chase Securities Corp. v. *Donaldson*, 325 U.S. 304 (1945) 6
Clark v. *Gulesian*, 429 F.2d 405 (1970), cert. denied, 400 U.S. 993 7
Edelman v. *California*, 344 U.S. 357 (1953) 7
Hulbert v. *City of Chicago*, 202 U.S. 275 (1906) ... 7
Laughlin v. *Forgrave*, 432 S.W.2d 308 (Mo. 1968) 6, 7, 9
Mills v. *Scott*, 99 U.S. 25 (1879) 5
Morgan v. *Horsky*, 178 U.S. 205 (1900) 5
Mutual Life Ins. Co. v. *McGrew*, 188 U.S. 291 (1903) 7
Northwestern Bell Telephone Co. v. *Nebraska State Ry. Commission*, 297 U.S. 471 (1936) 8
Preston v. *Chicago*, 226 U.S. 447 (1913) 5
Samborski v. *Price*, 417 S.W.2d 205 (Mo. 1967) ... 7

Saunders v. *Price*, 244 U.S. 317 (1917) 7
Shelley v. *Kraemer*, 334 U.S. 1 (1948) 8
Slagle v. *State of Ohio*, 366 U.S. 259 (1961) 8
Soper v. *Lawrence Brothers Co.*, 201 U.S. 350 (1906) 5
Terry v. *Anderson*, 95 U.S. 628 (1877) 5
Wilson v. *Cook*, 327 U.S. 474 (1946) 8
Wilson v. *Iseminger*, 185 U.S. 55 (1902) 5, 6
Wood v. *Chesborough*, 228 U.S. 672 (1913) 4

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment XIV 6
Constitution of the State of Missouri (1945) 6
28 U.S.C. §1257 8
Supreme Court Rule 16 ..... 2, 8
Mo. Rev. Stat. Ann., Section 516.140 (1969) ..4, 5, 6, 9
Mo. R. Civ. P., 79.03 7

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OPINIONS BELOW

Respondent concurs in Appellants' statement of the opinions below.

QUESTION PRESENTED ON APPEAL

There is no question on appeal as there is no judgment or other decision, final or provisional, in the courts below for this court to review. The issue Appellants attempt to raise on appeal should be presented as follows: Is it unconstitutional for the state legisla-

ture to enact a reasonable statute of limitations for tort actions in malpractice.

STATEMENT OF THE CASE

Respondent takes issue with the Appellants' statement of the case and deems it necessary to correct omissions therein.

The Appellants admit that the sole allegation of negligence against Respondent arises from a "transfusion" which occurred on or before May 22, 1971. Appellant, Maxine Allen, alleges that as a result of the transfusion she contracted hepatitis, which condition was discovered no later than September 17, 1971, twenty months prior to the running of the applicable statute of limitations.

The trial court rendered a Summary Judgment in favor of Respondent. Appellants sought a review in the Missouri Court of Appeals, Kansas City District. The Court of Appeals reversed the trial court's decision and remanded the case for a new trial on all issues.

Appellants then filed a Motion for Rehearing and Transfer to the Supreme Court of Missouri which was denied on January 12, 1976. The case was again set for trial in the Circuit Court of Missouri, Sixteenth Judicial Circuit but was continued indefinitely pending the outcome of Appellants' Appeal and/or Petition for Certiorari to this court.

MOTION TO DISMISS THE APPEAL FROM THE SUPREME COURT OF MISSOURI

Pursuant to Rule 16 of the Supreme Court Rules, Respondent files herewith its Motion to Dismiss the Appeal and as grounds therefor, states:

1. Appellants' Jurisdictional Statement fails to show that the federal question raised on appeal was expressly passed on by the court below or that there is any decision on the federal question in the court below.

2. Appellants' Jurisdictional Statement fails to present a substantial federal question.

3. Appellants did not timely or properly raise the claimed federal question in accordance with state law.

4. Appellants' Jurisdictional Statement does not affirmatively set forth the raising of the federal question below.

BRIEF IN SUPPORT OF MOTION TO DISMISS THE APPEAL FROM THE SUPREME COURT OF MISSOURI

I

The Motion to Dismiss the Appeal Should Be Sustained

Appellants' Jurisdictional Statement Fails to Show That the Question Raised on Appeal Was Expressly Passed on by the Court Below or That There Is Any Decision on the Federal Question in the Court Below.

As a new trial on all issues has been granted to Appellants by the Missouri Court of Appeals, this appeal is premature. Appellants admit that the issue raised by them was not ruled upon in their Jurisdictional Statement, at p. 1. No final decision on the constitutionality of Mo. Rev. Stat. Ann., Section 516.140, has as yet been rendered in this case. Without a judgment from the Missouri Court of Appeals, Kansas City District on the question presented by Appellants, Appellants fail to comply with Supreme Court Rule 16 requiring that the question presented be expressly passed on in the court below.

II

Appellants' Jurisdictional Statement Fails to Present a Substantial Federal Question

An appeal on the basis of the application of a limitations statute has never been favored by the Supreme Court. The application of laches or the statute of limitations does not usually present a federal question, e.g. *Wood* v. *Chesborough*, 228 U.S. 672 (1913);

Preston v. *Chicago*, 226 U.S. 447 (1913); *Morgan* v. *Horsky*, 178 U.S. 205 (1900).

In cases involving constitutional attacks on statutes of limitation, the court will defer to the judgment of state legislatures as to the reasonableness of the period allowed. In *Terry* v. *Anderson*, 95 U.S. 628 (1877), a suit to enforce the liability of the stockholders of a bank was barred by a state statute of limitations. The court stated:

> "In all such cases, the question is one of reasonableness, and we have therefore, only to consider whether the time allowed in this statute is, under all circumstances, reasonable. Of that the Legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed." 95 U.S. at 633.

In *Wilson* v. *Iseminger*, 185 U S. 55 (1902) the court added:

> "What shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." 185 U.S. at 63. *Accord*, *Soper* v. *Lawrence Brothers Co.*, 201 U.S. 350 (1906); *Mills* v. *Scott*, 99 U.S. 25 (1879).

The two-year statutory period found in Mo. Rev. Stat. Ann., §516.140, as well as its application in this case, are reasonable. A two-year period in which to bring suit is not so "manifestly . . . insufficient that

the statute becomes a denial of justice." *Wilson* v. *Iseminger, supra.* In *Laughlin* v. *Forgrave,* 432 S.W. 2d 308 (Mo. 1968), the Missouri Supreme Court en banc recognized the legislative intent of the malpractice limitation statute, and held that it violated neither the due process nor equal protection clauses of the United States Constitution or the Constitution of the State of Missouri (1945).

Mo. Rev. Stat. Ann., §516.140 as applied in the instant case does not deny Appellants due process, particularly since Appellant, Maxine Allen, discovered her injury one year and eight months prior to the running of the statute of limitations. Appellants had ample time in which to be heard, preserving their right to fair access to civil courts under the due process clause of the Fourteenth Amendment to the United States Constitution. Further, all litigants in malpractice claims in Missouri are treated alike, in that all have two years from "the date of the act of neglect complained of" in which to initiate suit.

Though Appellants present their case as a denial of due process, the "class legislation" complained of is more properly raised as a Fourteenth Amendment, equal protection argument. Unless a fundamental right is denied by the legislation, or a suspect classification is created, or invidious discrimination results, the proper equal protection standard is a rational basis for the legislation. The equal protection guarantee prohibits arbitrary discrimination, that which is not reasonably related to a legitimate governmental objective. The governmental objective fostered by the statute of limitations, as stated in *Chase Securities Corporation* v. *Donaldson,* 325 U.S. 304, 314, is "to spare the courts from litigation of stale claims, and the citizen from be-

ing put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." A legislative requirement that all medical malpractice suits be brought within two years is a reasonable method by which to meet this objective.

The court properly refused to review a recent First Circuit decision, *Clark* v. *Gulesian,* 429 F.2d 405 (1970), in which an argument similar to that of Appellants was made. In that case, the Maine statute of limitations was raised as a defense to a medical malpractice action. As in Missouri, the Maine limitation period began at the time of the wrongful act. As in *Laughlin* v. *Forgrave, supra,* the *Clark* court held that an application of the applicable statute of limitations was not a denial of due process or equal protection. The Appellants do not raise any new or substantial federal question for review by this court.

III

Appellants Did Not Timely or Properly Raise the Claimed Federal Question in Accordance With State Law

Under Missouri law, issues not raised by a party in his motion for new trial to the trial court are not preserved for appeal; Rule 79.03 Mo. R. Civ. P.; *Samborski* v. *Price,* 417 S.W.2d 205 (Mo. 1967). As Appellants did not raise the federal question they present on appeal in the motion for new trial, the issue was not properly preserved in accordance with the requirements of state law, and this court is without jurisdiction to decide whether constitutional rights have been violated. *Edelman* v. *California,* 344 U.S. 357 (1953); *Saunders* v. *Shaw,* 244 U.S. 317 (1917); *Hulbert* v. *City of Chicago,* 202 U.S. 275 (1906); *Mutual Life Insurance Co.* v. *McGrew,* 188 U.S. 291, 308 (1903).

IV

Appellants' Jurisdictional Statement Does Not Affirmatively Set Forth the Raising of the Federal Question Below

The statute authority upon which Appellants rely for their appeal to the United States Supreme Court, 28 U.S.C. §1257 (2), provides that final judgments of a state's highest court in which decision could be had may be reviewed by the Supreme Court where the validity of a state statute is questioned as being repugnant to the Constitution of the United States, and the decision is in favor of the validity. However, in the jurisdictional statement and accompanying appendix, it is nowhere indicated that Appellants asserted the limitations statute violated the *Federal* Constitution, prior to their phrasing of the question before this court.

The court has frequently held, and Supreme Court Rule 16 (1)(b) requires, that it must affirmatively appear from the record that the federal question was actually presented to the highest court of the state. *See, e.g., Slagle* v. *State of Ohio,* 366 U.S. 259 (1961); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Wilson* v. *Cook,* 327 U.S. 474 (1946); *Northwestern Bell Telephone Co.* v. *Nebraska State Ry. Commission,* 297 U.S. 471 (1936). Appellants have not shown that the federal question was presented to the Missouri courts for their decision.

ALTERNATELY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

I

Neither the Supreme Court of Missouri nor the Missouri Court of Appeals, Kansas City District Denied Appellants Any Right Under the Constitution of the United States in Their Decision in This Case nor in Upholding the Validity of Section 516.140 of the Missouri Statutes

Appellants request this court, should their appeal be denied, to treat their brief as a Petition for Writ of Certiorari. The grounds alleged are the same as those supporting their appeal. For all of the reasons set forth in Respondent's Brief in Support of Its Motion to Dismiss the Appeal, Respondent submits that the Appellants have failed to show that any decision of any court of Missouri in this cause presents any question to be settled by the Supreme Court of the United States.

In addition, Respondent states that Section 516.140 of the Missouri Statutes does not deprive Appellants of any rights under the Constitution of the United States. The statute in question has been enacted by the legislature of the state of Missouri. The statute's constitutionality has been questioned in the courts of the state of Missouri, and it has been found to be constitutional; *Laughlin* v. *Forgrave,* 432 S.W.2d 308 (Mo. 1968). As stated by the court in *Laughlin, supra,* "Our function is to interpret the law; it is not to disregard the law as written by the general assembly."

CONCLUSION

For the reasons stated, the Motion to Dismiss the Appeal should be sustained and the petition for a Writ of Certiorari denied.

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